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December 30, 1983

Mr. E. D. Walker
Chancellor
University of Texas System
601 Colorado Street
Austin, Texas 78701

Open Records Decision No. 405

Re: Whether auditor's report on alleged conflict of interest concerning university employee is protected from public disclosure by section 3(a)(2) or 3(a)(10) of the Open Records Act

Dear Mr. Walker:

You have requested a decision under the Open Records Act, article 6252-17a, V.T.C.S. Your request letter states:

> During the period between August, 1982, and June, 1983, personnel of the state auditor's office conducted an operations review of the computer center at the University of Texas at El Paso. During the course of this review, but separate and apart therefrom, the state auditor's personnel became aware of certain information which, in their opinion, represented a possible conflict of interest on the part of an employee at the computer center.
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> On July 1, 1983, the state auditor's office forwarded to Mr. William Erskine, Vice President for Business Affairs, the University of Texas at El Paso, a 7 page document which set forth certain information allegedly obtained by the state auditor's review team during the period of time that they conducted their operation's review of the computer center. This document contains the opinions and comments of the members of the review team with respect to what they considered to be a possible conflict of interest. Upon receipt of this information from the state auditor, the president of the University of Texas at El Paso ordered an investigation of the situation outlined by the state auditor.

You first contend that the entire seven page document may be withheld under section 3(a)(2) of the act, which excepts from required disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." You assert that:

> [t]his document contains unsubstantiated allegations with regard to the conduct of specific individuals which, if publicly disclosed, would be highly embarrassing and, therefore, would constitute an unwarranted invasion of the privacy of these individuals.

We disagree.

In Open Records Decision No. 400 (1983), we dealt with a similar situation. There, a citizen alleged that a neighborhood services representative of the Department of Housing and Neighborhood Services of the city of Dallas had engaged in illegal or improper job-related activities. The department investigated the allegations and prepared a report. It sought to deny public access to the report on the ground that public disclosure of the allegations, which it found were untrue, would infringe upon the employee's privacy interests. It based its claim that the information could be withheld on section 3(a)(2) and also upon section 3(a)(1), which excepts from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision."

After analyzing these sections, we held that the information was not protected from disclosure. We first noted that Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. Civ. App. - Austin 1983, writ ref'd n.r.e.), established that the common law privacy test articulated in Industrial Foundation of the South v. Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), applies to section 3(a)(2) as well as to section 3(a)(1). Under that test, information may be withheld only if it is highly intimate or embarrassing, its release would be highly offensive to a reasonable person, and the public interest in its disclosure is minimal. We concluded that even if the release of the requested information could be deemed to be highly offensive to a reasonable person, the information clearly was not of minimal interest to the public.

Like the allegations at issue in Open Records Decision No. 400, the charges made in this instance relate to the manner in which an employee performed his job. This information cannot be said to be of minimal interest to the public. We conclude, therefore, that neither section 3(a)(2), which you invoked, nor section 3(a)(1), which we may invoke on our own, is applicable.

You also claimed section 3(a)(11) of the act, which excepts from required disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency." This section excepts "advice, opinion and recommendations." See, e.g., Open Records Decision No. 335 (1982).

This investigative report contains statements purportedly made to the investigator from the state auditor's office, who wrote the report, by the employee under investigation and by others; it also contains information taken from various documents. You contend that some of this information may be withheld under section 3(a)(11). As we understand it, your argument is twofold: since some of those who allegedly made the reported statements deny having actually made them, it is only the "opinion" of the writer, to whom the statements were allegedly made, that the statements were in fact made; and since some of the "facts" referred to in the statements are erroneous, it is only "opinion" that these "facts" are really facts.

Your argument is intriguing, but we cannot accept it. In each instance, the writer of the report is impliedly asserting that the statements he reported were in fact made to him and/or that his comments contain data taken entirely and directly from either statements made to him or various documents that he examined. The writer is not, in other words, impliedly asserting that his comments reflect inferences or conclusions he drew from statements made to him or from the materials he read. Accordingly, when the writer states that "X occurred," he is in reality stating that a specific person or document told him that X occurred, not that he listened to various statements or read documents and inferred or concluded that X occurred. While we believe that inferences or conclusions drawn from statements or documents could be withheld as the "opinion" of the writer reporting them, we do not believe that statements containing only information and facts received entirely and directly from another source constitute the "opinion" of the writer making them. By way of example, if the writer impliedly states that "I talked to Mr. X and inferred from his statements that Y occurred," his inference would constitute his "opinion"; if, however, he impliedly states that "Mr. X specifically told me that Y occurred," such statement does not constitute his opinion and may not be withheld under section 3(a)(11). The fact that the person who allegedly made the original statement later denies having made it or that an erroneous factual predicate underlies the statements does not, in our view, make any difference.

Even if we were to assume arguendo that this writer's statements do constitute merely his "opinion," however, we would nevertheless conclude that they are not the type of "opinion" protected by section 3(a)(11). This office has frequently said that the purpose of section 3(a)(11) is to "protect advice and opinion on policy matters and to

encourage open discussion concerning administrative action." (Emphasis added). Open Records Decision No. 335 (1982), and decisions cited therein. The courts have confirmed this position. Austin v. City of San Antonio, 630 S.W.2d 391 (Tex. Civ. App. - San Antonio 1982, writ ref'd n.r.e.). In our opinion, these statements clearly are not statements of opinion on policy matters, nor do they fall within the realm of discussion concerning administrative action. Accordingly, we believe they are not the kinds of statements that section 3(a)(11) was designed to protect.

We therefore conclude that the entire report must be released.

Very truly yours,

Jim Mattox

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